No. 2758

United States Circuit Court of Appeals

For the Ninth Circuit

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH and LOGAN ARCHIBALD,

Appellees.

OPENING BRIEF FOR APPELLANT.

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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STATEMENT OF THE CASE.

This is an action brought by the appellees as plaintiff in the Court below against the appellant, the defendant, to compel specific performance of a contract entered into between the parties hereto for the conveyance by the appellant to the appellees, Treat and Smith, of an undivided one-tenth interest each in and to eight mining claims situated in the Valdez Mining District in Alaska, and for a decree adjudging the appellees to be the owners of an undivided one-fifth interest in all machinery, tools, equipment, buildings and improvements thereon, in the

proportion of a one-tenth interest to the appellee, Treat, and one-twentieth interest each to the appellees, Smith and Archibald.

The contract attempted to be enforced is dated July 9, 1908, and is to be found in paragraph five of the complaint (Transcript of Record p. 5). This is a contract whereby the appellees, Treat and Smith, undertook and agreed to incorporate a company to be known as the Mystic Gold Mining Company, pay all the cost of incorporation, and "give their time and attention in selling the amount of treasury stock necessary to be sold and give whatever time and attention that may be necessary for the proper organization of said corporation *and the sale of said stock*" and any consideration of such conveyance appellant was to convey to said corporation, the said mining claims, receive all the stock and give to appellees, Treat and Smith, twenty (20) per cent thereof.

It was also provided in the contract and in consideration thereof, that the appellees, Treat and Smith, were to receipt in full to the appellant for all claims which they, or either of them, had against the appellant, amounting in all to seven hundred and sixty-one ($761.00) dollars. The appellant disputes the amount of indebtedness and alleges that the appellees advanced to him the sum of five hundred ($500.00) dollars prior to the making of the contract for the purpose of shipping a certain quantity of the ore mined from said claims to the smel-

ter, and the said five hundred dollars was to be repaid out of the proceeds of the shipment, and in case that was not sufficient, that the agreement relating to the $500 should be deemed to be a mortgage against the said property to that extent. There was also a mortgage for two hundred ($200.00) dollars and interest from appellant to the appellee Treat upon the said property. The appellees claim to have released above indebtedness, and the appellant denies the execution of any release. The agreement for the five hundred dollars is set forth as Exhibit "A" to the complaint (Transcript of Record p. 15). There are other exhibits to the complaint with relation to options and leases which will be treated in this brief under the argument.

The trial was held at Valdez before Honorable Fred M. Brown, judge of the Third Division of the District Court for the Territory of Alaska, and resulted in a verdict for the appellees. From the decisions of the said judge upon the demurrer to the complaint, motions to strike out portions thereof, and from the decree and judgment entered upon the trial, this appeal is taken, and the appellant relies on the following:

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the

appeal in the above entitled cause, from the decree made by this Honorable Court on the 16th day of October, 1915.

I.

That the above named District Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

That the above named District Court erred in denying the motion of the defendant and appellant to strike out parts of plaintiffs' complaint filed in said cause.

III.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiffs' case, over the objection and exception of defendant, in the manner following: By striking out from Paragraph VI of said complaint the words "hold said contract of July 9, 1908, in abeyance and" for the reason that such amendment was prejudicial to defendant in the trial of this cause and the variance between the proof offered by plaintiffs and said complaint is so great as to be fatal to the cause of said plaintiffs.

IV.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiffs' case, over the objection and exception of defendant, in the manner following: By striking out from Paragraph VI of said complaint the words "At which time defendant specifically agreed verbally to and with plaintiffs Treat and Smith at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all the terms of said contract to be performed by him thereunder, or, that he, defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims," for the reasons before stated.

V.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from Paragraph XIII of said complaint the words "the plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908, heretofore set out, but" for the reasons above stated.

VI.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from Paragraph XIII of said complaint the words "to join plaintiffs in the organization of said corporation, or" for the reasons above stated.

VII.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from said complaint, from the first paragraph of the prayer thereof, the following words: "Specifically perform the contract of July 9, 1908, set out in the fifth paragraph of this complaint, or that he" for the reasons above stated.

VIII.

That the above named District Court erred in denying the motion of defendant and appellant for a dismissal of this action by reason of the failure of plaintiffs to offer sufficient evidence to sustain their pleadings; which said motion, ruling of said Court and exception of defendant and appellant thereto, appear upon the record in said cause.

IX.

That the above named District Court erred in overruling defendant's objection and exception to the findings of fact and conclusions of law of the Court herein, for the reason that the same are against the law and contrary to the law and against the evidence and not supported by the evidence, and not justified by the evidence, and for the reason that there is not any evidence to support the same or any part of the same.

X.

That the above named District Court erred in rendering and making its final decree and judgment herein for the reason that the same was against the law and contrary to the law, and unsupported by the facts of the evidence, not justified by the evidence, and for the reason that there is no evidence to support the same.

ARGUMENT.

The writer will endeavor, in this brief, to discuss the errors complained of in the order in which they appear in the assignment of errors.

I.

The Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause. Appellant contends

that the complaint does not state facts sufficient to constitute a cause of action against him for the following reasons:

The action purports to be one to compel specific performance of the contract set forth in Paragraph V of the complaint, and nowhere does it appear that the plaintiffs had performed their part of the contract, to-wit: that portion of it in which the plaintiffs covenanted to "give whatever time and attention that may be necessary to the proper organization of said corporation AND THE SALE OF SAID STOCK." Nowhere does it appear that the plaintiffs ever gave the necessary, or any attention, to the sale of the stock, or ever sold a dollar's worth of stock. Of course, it is unnecessary to cite authorities to the point that specific performance will not be decreed unless the party asking it has performed or offered to perform these things that it was his duty to perform.

Further, the contract of July 9, 1908, calls for the release of *all* claims against the defendant, but the complaint only alleges the release of two specific claims.

Again, the contract is one that cannot be enforced by the Court by reason of a lack of mutuality of remedy. The Court may decree for specific performance by defendant, but could not decree that plaintiffs sell the amount of stock necessary to be sold and give their time and attention that might be necessary to the proper organization of said corpor-

ation, and especially the sale of such stock; that the contract sued on calls for the performance of personal services of an indefinite and uncertain character. It could not be specifically enforced against plaintiffs, and it is a fundamental principle of equity that equity will not enforce specifically a contract against one party when the Court could not in the very nature of things specifically enforce it against the other.

Federal Oil Company vs. *Western Oil Co.,* 121 Fed. 677;

Cooper vs. *Pena,* 21 Cal. 410;

Stanton vs. *Singleton,* 47 L. R. A. 334;

Harlow vs. *Oregonian Pub.,* 78 Pacific 730;

Joliffe vs. *Steele,* 98 Pacific 544.

The appellant further contends that the contract in question is indefinite and uncertain and could not for that reason be specifically enforced by the appellees against him in that it does not show how much money should be raised by the plaintiffs by the sale of stock, nor when the same should be sold, nor how much time the plaintiffs should give to the organization of the corporation, and especially to the selling of the stock.

Stanton vs. *Singleton,* 47 L. R. A. 344.

Another interesting case on the question of mutuality of remedy is

General Electric Co. vs. *Westinghouse,* 144 Fed. 458.

The allegations that defendant and plaintiffs, Treat and Smith, agreed mutually to hold the contract of July 9, 1908, in abeyance and entered into a contract with A. J. Crane to lease the mining claims do not alter the terms of the contract itself, and it is apparent from the pleadings that the plaintiffs Treat and Smith lost nothing by such a holding in abeyance, since they plead the stringency of money market and the difficulty that would be experienced in selling the treasury stock agreed by them to be sold.

The allegations in the complaint that the plaintiffs and defendant agreed verbally that at the termination of the release referred to in the complaint that the defendant would join the plaintiffs, Treat and Smith, in forming the corporation as provided for in the contract of July 9, 1908, and that he would deed to each of them an undivided one-tenth interest in the claims, is clearly within the statute of frauds, and therefore ought to have been in writing for two reasons:

First, by its terms, it was not to be performed within a year from the making thereof, and,

Secondly, that it was a verbal agreement for the sale of real property or an interest therein, because it cannot be seriously contended that this was not a new contract and being verbal, it was clearly void, and, furthermore, there was no consideration whatever for it.

The statute of frauds, as laid down in the Alaska Code, is not different from other statutes of fraud in the other states (see Section 1044 Carter's Annotated Alaskan Codes, page 354; also Section 1046, page 355).

It is believed for these reasons that the complaint in this action does not state a cause of action against the defendant and therefore that the Court erred in overruling the demurrer.

II.

That the above named District Court erred in denying the motion of the defendant and appellant to strike parts of plaintiffs' complaint filed in the said cause.

The motion to strike out portions of the complaint is found on page 28 of the Transcript of Record, and in connection therewith, counsel will endeavor to make his argument as short and concise as facts will permit him.

In connection with this motion to strike, it must be remembered that the action is one to compel specific performance of the contract of July 9, 1908, referred to in Paragraph V of the complaint. This being the case, can there be any argument on the question that Paragraph II (Transcript of Record p. 3), setting forth that before the said contract was entered into that the plaintiffs, Treat and Smith, advanced the defendant the sum of $500; and in

connection therewith, the plaintiffs have attached to their complaint Exhibit No. 1, Transcript of Record p. 15, is not irrelevant and redundant? The agreement which is sought to be enforced provides that the plaintiffs should release to the defendant all previous indebtedness by him to them; therefore, why should the details of this previous indebtedness be inserted in the complaint if it was not for the purpose of bolstering up the theory that is dear to the heart of every Alaskan miner, that the plaintiffs had grub-staked the defendant in his mining operations, and that the subtlety of this intention permeated the case, was finally shown by the decision of the learned trial judge? But so far as the prosecution of this action was concerned, it was no more material to set out the facts alleged in Paragraph II and Exhibit "A" connected therewith than it would be to allege any other indebtedness. The contract itself speaks of previous indebtedness to the defendant and alleges that such debt was to have been cancelled and, at the most, Paragraphs II and III of the complaint were evidentiary and are certainly redundant and surplusage.

The third cause for the motion to strike as to Paragraph IV of the complaint, the writer submits is covered by the objections above urged as to Paragraph III of the complaint. Paragraph IV of the motion to strike out portions of Paragraph V of the complaint is based upon the ground that the contract mentioned in said Paragraph V is such a one that the Court could not order specific performance

of, for the reasons that it is uncertain and incapable of being enforced against both parties thereto, and is therefore irrelevant and redundant.

Paragraph VI of the complaint is objectionable on the ground that therein is contained an effort to vary by parol agreement the terms of a written document, to-wit: the contract of July 9, 1908. Paragraph VII of the complaint, counsel submits, is irrelevant and immaterial by reason of the fact that therein it is attempted to set up a new written agreement which is not the one that is sought to be enforced in this action; and for the additional reason that there is no consideration alleged therein moving from the plaintiffs to the defendant.

Paragraph X of the complaint is clearly immaterial and redundant by reason of the fact that if the plaintiffs could recover, under the contract in question, a twenty per cent interest in said real estate, it would naturally follow that the buildings upon the premises would go with it, and the latter part of Paragraph X wherein it is alleged that the plaintiffs are the owners of twenty per cent interest in said mining claims, and under the terms of the lease mentioned, are the owners of twenty per cent interest in and to the tools, machinery, buildings and equipment is surplusage, and is immaterial and is a mere conclusion of the pleader without any facts having been theretofore stated to show that the plaintiffs were such owners.

The objection to Paragraph XII of the complaint to the effect that the defendant, during all of the time mentioned since the execution of the contract of July 9, 1908, never questioned or disputed the right and title of plaintiff to said premises and property, but during all of said time recognized and provided said title by plaintiffs is purely evidentiary and should have no part in the complaint in this action.

Counsel for the appellant therefore submits that the motion to strike out the portions of the complaint complained of was so clearly right that it would be idle to cite authorities upon facts so clearly demonstrated.

III.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint at the close of plaintiffs' case by striking out from Paragraph VI the words "holds said contract of July 9, 1908, in abeyance and," and also for permitting the plaintiffs to amend their complaint by striking out from Paragraph VI of the complaint the following sentence: "At which time defendant specifically agreed verbally to and with Treat and Smith at the termination of said lease, he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of said contract to be performed by him thereunder, or that he, defendant,

would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each of the said mining claims."

If it was proper, or even admissible, for the Trial Court to strike from the complaint the above extracts after trial, surely it is a demonstration of the fact that the Court ought to have sustained the demurrer to the complaint in its original form and should also have granted the motion to strike, interposed by the defendant. Could there be any reason for striking out the expression "to hold said contract of July 9, 1908, in abeyance" unless the Court had in mind, and unless the evidence showed, that there was no consideration that was enforceable, by reason of lack of consideration? And counsel for the appellant is at a loss to know why the Court struck out the latter portion of the paragraph referred to if it was not in an effort to avoid the statute of frauds. The complaint was verified and stated specifically in Paragraph VI that the agreement of the defendant to deed to the plaintiffs Treat and Smith an undivided one-tenth interest in the said mining claims was verbal.

Surely the plaintiffs were bound by their verified complaint, and if it was true that the agreement was verbal, then it came within the statute of frauds and was void. This, one of the plaintiffs in the action swore to, and counsel for the appellant refers the Court to the previous argument with relation to the statute of frauds in the discussion upon the demurrer to the complaint.

The fifth assignment of error is based upon the action of the District Court for permitting the plaintiffs' motion to amend their complaint by striking out from Paragraph XIII the words, "plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908," heretofore set out. If it is true, and the appellant claims it is, that the appellees did not show in the trial of the cause that they were ready, able and willing to perform their part of the contract of July 9, 1908, then it was error to strike out that allegation in Paragraph XIII because without that allegation, followed by proof of the willingness and the ability of the plaintiffs to perform their parts, the action for specific performance would naturally fail. This suggestion runs as well to Assignment of Error VI and VII, Transcript of Record pp. 352-353. It would seem to counsel for the appellant that the Court went to trial upon a defective complaint, but which, nevertheless, contained specific statements which were essential to the plaintiffs' case, and when the proof utterly failed to establish these allegations, the Court thereupon permitted the complaint to be filed to fit the proof and completely changed the cause of action.

Again, counsel refers to the fact that this action is brought, and the prayer of the original complaint was, that the defendant specifically perform the

contract of July 9, 1908; then, the Court, after proof, strikes out all reference to the contract of July 9, 1908, and gives a judgment against the defendant upon other and subsequent contracts, some of them written and some of them verbal, and to none of which there was any consideration and decrees that the plaintiffs are entitled to a one-fifth interest in this valuable mining property.

The eighth assignment of error, Transcript of Record p. 353, which suggests that the Trial Court erred in denying the motion of defendant for dismissal of the action by reason of the failure of plaintiffs to offer sufficient evidence to sustain their pleadings, hardly needs an argument because of the fact that if the Court had not permitted the plaintiffs to entirely change their cause of action after the plaintiffs' case was complete, there would have been no evidence whatever to warrant such a verdict as the one that was rendered; in other words, the plaintiffs predicated their suit on a certain contract and wound up by getting a judgment on a totally different contract, partly written and partly verbal.

There is a great mass of evidence in the case showing a violent difference between the stories of the plaintiffs and defendant, but, had the plaintiffs been restricted in the giving of their evidence to the four corners of their complaint the action would inevitably have been dismissed.

It is respectfully submitted, therefore, that the judgment of the Court below should be reversed.

Respectfully submitted,

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